

M.C.P. Foods, Inc. and Mary Morrissey, Petitioner and General Truck Drivers, Office, Food & Warehouse Union, Local 952, International Brotherhood of Teamsters, AFL-CIO. Case 21-RD-2494

July 16, 1993

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The Union's request for review of the Regional Director's Decision and Direction of Election is denied as it fails to raise substantial issues warranting review. Pertinent portions of the Regional Director's Decision and Direction of Election are attached.

In addition to agreeing with the Regional Director that the employing entity in this case at all times remained the same,¹ we also agree with the Regional Director that the Employer's collective-bargaining agreement with the Union does not serve as a bar to the petition herein. In doing so, we rely on the principles set forth in our decision in *Shen-Valley Meat Packers*, 261 NLRB 958 (1982). The parties in that case, like the parties here, agreed to a 5-year contract. They signed an amendment to the contract, reaffirming the contract and restating its expiration date, during the first 3 years of the initial long-term contract. The Board found, relying on *Southwestern Portland Cement Co.*, 126 NLRB 931 (1960), that the amendment was, in effect, a premature extension of the contract because it was executed during the 3-year period of "reasonable duration"² and extended the contract beyond 3 years. The Board held that the premature extension governed the timeliness of a decertification petition which was filed after the initial 3-year anniversary date of the long-term contract.³ Since the petition was not timely filed, it was dismissed.⁴

The parties in the instant case signed a 5-year contract and signed an amendment, reaffirming the contract and its expiration date, prior to the 3-year anniversary date of the initial agreement. The amendment is therefore, as in *Shen-Valley*, a premature extension of the initial agreement and in other circumstances, the term of the contract following the amendment would govern the timeliness of the petition. However, unlike the situation in *Shen-Valley*, the petition here was filed during the open period relative to the third anniversary date of the original, overly long contract. Were we to

find that only the later, as amended, contract filing period applied, Petitioner would have been deprived of the window period of the original contract. A premature extension cannot serve to deprive a petitioner of the open period under the original contract. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001-1002 (1958); *H. L. Klion Inc.*, 148 NLRB 656, 660 (1964).

MEMBER DEVANEY, dissenting.

I would grant the Union's request for review.

APPENDIX

DECISION AND DIRECTION OF ELECTION

On March 8, 1993, Mary Morrissey, an employee and member of the bargaining unit, filed the instant petition. The Union contends that the collective-bargaining agreement currently in effect between the parties is in the second year of its term and thus, the contract bars the filing of the petition at this time. Accordingly, the Union moved to dismiss the petition.

The Employer, on the other hand, asserts that the collective-bargaining agreement to which the parties are obligated, has effective dates from June 1, 1990, through June 1, 1995. As the agreement has a duration period of over 3 years, the petition was timely filed within the appropriate window period before the third anniversary for the collective-bargaining agreement, and the contract cannot serve as a bar.

The Employer is a Delaware corporation engaged in the manufacturing of flavor food products with a facility located at 424 South Atchison Street, Anaheim, California (the Anaheim facility).

The record disclosed that on January 26, 1991, the Union and M.C.P. Foods-Borden signed a collective-bargaining agreement which had effective dates of June 1, 1990, to June 1, 1995. The employing entity, MCP Foods, Inc. (MCP Foods or Employer)¹ was a wholly-owned subsidiary of Borden's Inc.

On September 30, 1991, effective September 27, 1991, Firmenich, Incorporated (Firmenich) purchased and acquired the stock of MCP Foods, Inc. As a result of this transaction, MCP Foods, Inc. became a wholly-owned subsidiary of Firmenich. Subsequent to the stock purchase, the business operation continued without any change in the nature of the operation.

Early in September 1991, before the above acquisition was complete, officials from Firmenich were advised of the collective-bargaining agreement between the Union and MCP Foods. On September 12, 1991, Vice President John Layendecker and other management representatives from Firmenich met with Frank Sevilla, business representative for the Union, at the Anaheim facility, to discuss the effects of the sale. Sevilla was informed of the impending sale and advised that some changes in the benefits would be requested but otherwise the collective-bargaining agreement would continue in effect. Either at this meeting or a meeting held shortly thereafter, the parties first discussed the specific details of the major changes. Sevilla was asked for his input and concerns relating to the changes proposed by Firmenich. Sevilla

¹ In connection with this issue, the Regional Director inadvertently cited, inter alia, *Bannon Mills*, 146 NLRB 611 (1964); it is evident that the Regional Director meant to cite the immediately preceding case, *Grainger Bros. Co.*, 146 NLRB 609 (1964).

² See *General Cable Corp.*, 130 NLRB 1123 (1962).

³ In addition, the petition was filed prior to the open period relative to the expiration date of the "premature extension" period.

⁴ *Shen-Valley*, supra, fn. 5 and 8.

¹ The Employer's name appears as amended at the hearing.

informed Layendecker that the Union would be open to discuss all of Firmenich's proposals; however, before any of the proposals could be agreed to by the Union, they would have to be ratified by the unit employees.

The record testimony reflects that after September 30, 1991, the parties held 6 to 10 meetings during which Firmenich presented certain alternatives to specific terms in the collective-bargaining agreement. Under the collective-bargaining agreement in effect at the time of the acquisition, Borden provided Borden-sponsored company benefits to include a shared premium company health plan; a company profit-sharing/pension plan; nine paid holidays; a limited company sick leave plan; and an employees' company savings plan, but no long-term disability insurance. Layendecker informed the Union that as the health plan and the savings plan under the collective-bargaining agreement were Borden-sponsored plans, Firmenich could not provide them. Thus, Firmenich would provide for health coverage with CIGNA with a 100-percent Employer-paid premium and offer a 401-A/401-K plan to the bargaining unit employees. Further, Firmenich would offer 10 paid holidays and a more liberal sick leave policy than provided for by Borden. Finally, Firmenich would provide long-term disability insurance coverage. The parties addressed other minor changes to the terms and conditions of employment stated in the collective-bargaining agreement, including the accrual of vacation leave, makeup pay for disability leave, leaves of absence, funeral leave, a substance abuse policy, tuition and aide plan, and jury duty.

At a meeting on November 18, 1991, Firmenich presented to the Union a written health and welfare package as well as other language changes desired. Sevilla stated to Layendecker that to enable the Union to make a decision, he and the shop steward wished to meet with a CIGA representative. Sevilla also requested that the Employer call a meeting of the employees to allow them to receive information on the health and welfare, as well as the 401-A/401-K plans. Layendecker agreed to the meeting and informed Sevilla that the employees were already getting some of the benefits and others would be implemented over the next couple of days. A copy of the package was distributed to all of the employees covered. It is not clear from the record on which date the Employer implemented the changes in the health and welfare benefits.

On December 13, 1991, the proposed changes were approved by the bargaining unit employees. Subsequent thereto, Sevilla had the Union's counsel review documents pertaining to the memorialization of the change. Several revised drafts were exchanged between the parties during March and/or April 1992. A final draft was signed by Sevilla and Robert Daunais as president of M.C.P./Firmenich on July 8, 1992.

The cover page of the agreement executed on July 8, 1992, states that the agreement is between M.C.P./Firmenich and the Union, with effective dates of June 1, 1990, through June 1, 1995, as amended January 1, 1992.

The Union contends that MCP Foods, as a result of the purchase by Firmenich, is a "legal successor" to the company previously owned by Borden. As such, it argues that when the parties executed the agreement described above on July 8, 1992, the effective dates of the agreement became effective January 1, 1992, to June 1, 1995. The Union thus asserts that this new successor agreement controls the time pe-

riod when a decertification petition can be filed. Accordingly, the Union contends that the window period under the 1992-1995 agreement controls, and that the petition herein is untimely.

The Employer contends that the stock purchase by Firmenich has not changed the legal status of the employing entity, MCP Foods. Thus, while the parties executed an amendment to the 1990-1995 agreement on July 8, 1992, the amendment did not affect the viability of the 5-year agreement, and the petition was timely filed.

The Board has long held that a mere change of stock ownership does not absolve a continuing corporation of responsibility under the Act. *Western Boot & Shoe*, 205 NLRB 999 (1973). If the changes in the ownership and corporate name do not result in any significant changes in the nature of the operation, the management, the composition of the contractual unit, or the stability of the existing bargaining relationship, there is no break or hiatus between two legal entities, but rather the continuing existence of a legal entity, albeit under new ownership. *Bannon Mill*, 146 NLRB 611 (1964); *Hendricks-Miller Typographic Co.*, 240 NLRB 1082 (1979).

The record in the present case reveals that the employing entity, MCP Foods, is a Delaware corporation which is a totally owned subsidiary of the parent company, Firmenich. Aside from some personnel changes in the management level, MCP's operations continued and its employee complement was not altered as a result of Firmenich's acquisition of stock from Borden. Further, Sevilla testified that the parties continued to enforce and abide by the terms of the original collective-bargaining agreement after the transfer of the stock. Accordingly, the record supports a conclusion, and I find, that MCP Foods continued as the same employing entity after the stock acquisition by Firmenich, with enforceable obligations under the existing 1990-1995 collective-bargaining agreement. *EPE, Inc.*, 284 NLRB 191 (1987), *enfd.* in pertinent part 845 F.2d 83 (4th Cir. 1988).

The Union contends that this case should be controlled by the Board's decision in *Ideal Chevrolet*, 198 NLRB 280 (1972). In *Ideal Chevrolet*, the Board found that the union and the predecessor employer had executed a 3-year collective-bargaining agreement. During the term of the agreement, the predecessor was purchased by a successor employer. Subsequent to the successor employer assuming the business, the union and the successor employer entered into a new agreement. Thereafter, a petition was filed by a rival union, which would have been timely had the terms of the predecessor agreement been controlling. The Board dismissed the rival union's petition inasmuch as it concluded that parties' successor agreement was controlling for purposes of determining when a petition should be timely filed.

I have found that the Employer herein is not a legal successor, but rather the same employing entity since 1990. The Board's holding in *Ideal Chevrolet* is, therefore, not applicable herein.² Further, while the record discloses that the parties executed an agreement on July 8, 1992, I find that the parties amended the 1990-1995 collective-bargaining agree-

²The Board has distinguished the rights and obligations owed to the employees' collective-bargaining representative and the unit employees by a legal successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and a continuing employing entity after a stock transfer.

ment, and that the parties did not enter into a new or successor collective-bargaining agreement.

The Board, in *General Cable Corp.*, 139 NLRB 1123, 1125 (1962), held that a collective-bargaining agreement of more than 3 years' duration is treated for contract-bar purposes as expiring on its third anniversary date, and that it does not bar a petition filed in the window period 90 to 60 days preceding the long-term contract's third anniversary date.

In the instant case the decertification petition was filed on March 8, 1993. The terms of the initial agreement which I have found controlling are from June 1, 1990, to June 1, 1995. In applying the Board's *General Cable Corp.* ruling, the third anniversary date of the agreement for contract-bar purposes would be in 1993. As the petition herein was filed within the window period preceding the initial agreement's third anniversary date, the petition was timely filed. Based on the foregoing, I find that the current collective-bargaining agreement between the Union and the Employer herein does not constitute a bar to the instant petition, and I conclude that an immediate election is appropriate.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act:

All production and maintenance employees employed by the Employer at its facility located at 424 South Atchison Street, Anaheim, California, including traffic department (shipping and receiving), working forepersons, and durarome operators and helpers employed within the pilot plant department, excluding all other employees, office/clerical employees, professional employees, Company officials, confidential employees, managerial employees, advertising employees, sales personnel, laboratory employees, inclusive of quality control and research and development employees, and outside janitorial service employees, guards and supervisors, as defined in the Act.

The unit description is substantially in accord with a stipulation of the parties.

There are approximately 56 employees in the unit.